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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1985

No. _____

WILLIAM HOWARD PUGH,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE 4TH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

William M. Winkel, Esq.
P.O. Box 2153
Palm Beach, Florida
33480

Counsel for Petitioner

12 pp

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QUESTIONS PRESENTED

1. Where a law enforcement officer who is the affiant in the affidavit of probable cause is, by his superiors, intentionally told lies or falsified facts and affiants' superiors cause affiant to unknowingly or with reckless disregard of the falsity of said facts, swear that said facts are true,

is such a search warrant ever subject to challenge?

2. Whether the trial court erred in refusing to consider Petitioner's allegations of misrepresentation in the warrant affidavit.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Court below was against the right, privilege or immunity.

1. The judgment in the Court below was filed on April 3, 1985, and entered May 8, 1985.

2. A motion for rehearing was filed on April 16, 1985 and a response thereto filed April 19, 1985. The order denying the motion to rehear was filed May 8, 1985. No order extending the time within which to petition for Certiorari has been granted.

3. The statutory provision believed to confer jurisdiction on this Court to review judgment by Writ of Certiorari is 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision is found in Volume I, page XLVIII of the Official Edition.

The case further involves the Fourteenth Amendment of the United States Constitution, Section I, which reads as follows:

> All persons born or in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This provision is found in Volume I, page XLIX of the Official Edition.

STATEMENT OF THE CASE

1. Facts: The Petitioner was originally charged with trafficking in cannabis in excess of 100 pounds. However the State reduced the charge to attempted trafficking in cannabis in excess of 100 pounds and Petitioner plead no contest to the reduced charge specifically reserving his right to appeal the denial of his motion to suppress as the Court, State and Petitioner agreed that motion to suppress was dispositive of the case.

The Petitioner appealed the denial of his motion to suppress on the grounds that the trial court erred in refusing to hear certain evidence at a suppression hearing. The denial of Petitioner's motion to suppress was affirmed on appeal by the Fourth District Court of Appeal of the State of Florida. The Fourth District Court of Appeal filed Its decision on April 3, 1985.

The decision was a per curiam affirmance, without citation or opinion. The Supreme Court of Florida has no jurisdiction under the Florida Constitution to review district court of appeal's per curiam affirmance. Jenkins v. State[1].

According to the affiant in the affidavit used to establish probable cause for the issuance of the search warrant cannabis was being smuggled from Petitioner's residence.

A search warrant was obtained by law enforcement officials and used to seize a boat, automobile, personal effects and cannabis, which were the subject of Petitioner's motion to suppress. The trial court refused to hear evidence offered at the suppression hearing to impeach the veracity, reliability and probative value of the affidavit used to establish probable cause for the issuance of the search warrant.

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[1] 385 So.2d 1356 (Fla. 1980)

2. The Federal Question: The federal question sought to be reviewed was first raised at the suppression hearing. Petitioner filed his memorandum in support of his motion to suppress. See Appendix D, pages 4-13 wherein the memorandum proffers the sworn testimony of law enforcement officers which was before the trial court in the form of sworn depositions. The sworn testimony of Lt. Murphy, Lt. Jones, Sgt. York, and Agent Hilson which was proferred demonstrates the falsehoods, the disregard of the truth, the unreliability and irrelevant nature of the affidavit. It is interesting to note that Lt. Jones in his deposition stated:

> ..if it was left up to me to get a search warrant, I don't think I could have gotten a search warrant on what I seen...Appendix D, pages 8 and 9

and he was on surveillance with Agent Hilson.

At the suppression hearing the trial court stated at page 17 of Appendix E:

> ...Well, I don't believe you can attack a search warrant by showing that some of the facts are false. You can only attack it by showing that the affiant falsified those facts, that...that the facts that the affiant set forth he knew were false.

At page 30 of Appendix E the Court stated:

> ...The validity and the truth of the affidavit is whether the affiant told the truth as to what he put in the affidavit and not as to whether the people who reported to him were telling the truth or not, so I'll sustain the objection.

Again at page 73 of Appendix E the Court rules:

> Now we're having a hearing on the motion to suppress at this time and that's what I'm--and you are proceeding with it and when you're through with--with your presentation of evidence then I'll hear any evidence the State wants to present and then I'll hear any rebuttal evidence you want to present, then I'll be glad to hear argument on--on the motion. I-I-I think we are having a hearing, I don't know --I'm not gonna have a hearing within a hearing. I don't know what--what you're trying to do. I mean why can't we do this orderly, I mean the normal usual way to hear a motion to suppress.

At pages 3, 4 and 74 of Appendix E Petitioner proferred testimony which the trial court refused to hear.

If the false, unreliable and immaterial portions of the affidavit are excluded there is no remaining content upon which to base a search warrant.

ARGUMENT

The Petitioner offers the following argument in support of allowance of the writ:

1.

THE INSTANT CASE PRESENTS A QUESTION OF "SUBSTANTIAL SIGNIFICANCE" THAT HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT

This Court in Franks v. Delaware[2] held that a warrant may be attacked on the grounds that the issuing judge was misled by information provided in the affidavit that the affidavit knew was false or would have known was false except for his reckless disregard of the truth.

It is a self-evident truth that Justice cannot condone the doing of something indirectly that it will not allow to be done directly. Therefore where the affiant to an affidavit is fed falsehoods, false information and told that evidence was reliable

[2] 438 U.S. 154

when in truth it was not and this false, unreliable information is knowingly fed to the affiant by law enforcement officers who know that the magistrate will thereby be duped and issue a search warrant, such a warrant must be voided and the fruits of the search be excluded; to decide otherwise makes the court an accessory to unlawful activity. Inherent in the above outlined situation is to make the judiciary the puppet of administration with police state overtones.

This Court in Weeks v. United States[3] and Mapp v. Ohio[4], required the exclusion from federal and state courts, respectively, of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. That Amendment prohibits "unreasonable searches" and declares that "...no warrants shall issue, but upon probable cause, supported by oath or affirmation...". Ex-

[3] 232 U.S. 383 (1914)

[4] 367 U.S. 643 (1961)

tensive judicial consideration has been given to the allegations of an affidavit necessary to establish probable cause[5].

In accordance with Florida practice and Rule 41(e) of the Federal Rules of Criminal Procedure, an aggrieved person may move to suppress evidence on the ground that there was not probable cause for believing the existence of the grounds on which the warrant was issued. Reason dictates that a determination of probable cause would involve the exploration of the accuracy as well as the sufficiency of the allegations in a supporting affidavit.

II.

FOURTH AMENDMENT RIGHTS REQUIRE JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT.

Inherent in our judicial system is the

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[5] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949)

principal that truth and the seeking of the truth is best served in the crucible of our adversary system. Ex parte proceedings were so abhorrent to our forefathers that they placed specific prohibitions against bills of attainer in our Constitution[6].

The pre-search proceeding is ex parte of necessity and if Petitioner is denied his right to a full and fair hearing forbidding a probe into the truthfulness of the affidavit he can never challenge the truthfulness, reliability or probative value of the evidence presented at the ex parte hearing wherein the search warrant is issued.

III.

THE EVIDENCE PRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE.

In the affidavit for the search warrant

[6]United States Constitution, Article I, §9

issued on January 27, 1983, five (5) facts were alleged to establish probable cause. Of those five facts, it is submitted that none provided a basis for the belief that physical evidence connected with trafficking in cannabis might be found in the searched premises:

a. Fact One - Garbage Pickups:

The controlled garbage pickups are of no probative value as the Petitioner at the suppression hearing below offered to produce evidence Lt. Murphy didn't know who put the garbage in front of Petitioner's house (See Appendix D, page 4). Petitioner testified at the suppression hearing in the trial court that he was out of the State of Florida during the month of August (See Appendix E, page 77).

b. Fact Two - Surveillance:

The affiant lied about a Mako boat and Petitioner's control of said boat. The affiant only saw an empty dock and on one

occasion a different boat named the Sea Angel (See Appendix E, pages 24 and 25).

Affiant never saw any illegal activity and neither did anyone else (See Appendix E, pages 24 and 57).

c. Fact Three - Confidential Informers:

According to Lt. Murphy there were several informers whose reliability was not stated nor was the time when they gave their information to Lt. Murphy established (See Appendix E. pages 26-30). And more importantly, the proffer would have shown that there was never anytime established regarding the time when the condifential informers supposedly received their information. The affidavit doesn't establish this important time frame (See Appendix D, page 6).

d. Fact Four - The BOLO:

Agent Hilson said he had no reason to believe the BOLO concerned Petitioner (See Appendix E, page 48).

e. Fact Five - Becker:

The supposed fact of the Becker friendship in the affidavit is totally untrue (See Appendix D, pages 13 and 14).

The trial court's refusal to hear the evidence proferred at the suppression hearing bore on issues central to the sufficiency of the affidavit for the application of a search warrant and it was an error for the trial court not to hear and consider the proferred testimony.

IV.

THE LAW ENFORCEMENT OFFICIALS FABRICATED FACTS TO SUPPORT THEIR SUSPICIONS.

The case of the United States v. Leon[7] emphasizes what has always been the law, that mere suspicion on the part of law enforcement officers is not a sufficient ground for the issuance of a search warrant.

The Leon case makes it clear that ignor-

[7] 104 S.Ct. 3405 (1984)

ance of the law will not excuse violations of the Fourth Amendment, no matter what the officer's subjective good faith:

> We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers... The objective standard we adopt ...requires officers to have a reasonable knowledge of what the law prohibits[8].

It is clear, therefore, that law enforcement officers are charged with knowing the difference between probable cause and reasonable suspicion.

In the instant case the entire affidavit is based on suspicion:

a. The garbage pickups were made on suspicion. Petitioner proffered Lt. Murphy's testimony (See Appendix E, pages 15-18) in regard to the garbage pickup. The testimony of Lt. Murphy would have been that he didn't know whether the garbage came from Petition-

[8] Ibid.

er's house (See Appendix D, page 4).

b. The affiant, Agent Hilson testified he only saw an empty dock and on one occasion a boat different from Petitioner's (See Appendix E, pages 25 and 62). The surveillance he reported on January 27, 1983 is all based on suspicion. Affiant says some of his information came from Officer Battey. Affiant further testifies Battey only told him of his (Battey's) suspicions (See Appendix E, page 57).

c. In regard to the confidential informers the testimony was they (note more than one) saw "suspicious" activities (See Appendix E, page 27).

d. The BOLO is all suspicion and no substance as earlier demonstrated herein.

e. The Becker friendship is false and provided false grounds to add to the affidavit. Petitioner was not allowed to question Lt. Murphy in his regard and proferred to the trial judge that Lt. Murphy had told

Judge Harper, the judge who signed the search warrant, that there was no connection between Petitioner and Becker (See Appendix E, page 98 and Appendix D, page 14).

CONCLUSIONS

It is respectfully submitted that if the Fourth Amendment is to succeed in its stated purpose of protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...," a review of the validity of an affiant's allegations in addition to their sufficiency is required, in accordance with carefully reasoned opinions such as King v. U.S.[9] in which the court concluded, "The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted."[10]

It is respectfully submitted that every material misstatement and false assertion should require exclusion of the evidence obtained as a result of false information.

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[9] 282 F. 2d 398 (1960)

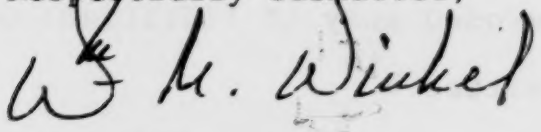
[10] Ibid., p. 399

Such exclusion is necessary to deter law enforcement officers from setting up the Magistrate with falsehoods and in order to adequately preserve constitutionally guaranteed rights against unreasonable searches and seizures.

In view of the importance of the issues presented in this case, granting of the Writ Of Certiorari is indicated.

In view of the foregoing, the issuance of a Writ Of Certiorari is earnestly solicited.

Respectfully submitted,



William M. Winkel

Counsel for Petitioner

APPENDIX

Attached

ITEM

A/ ORDER PER CURIAM AFFIRMED 5/8/85
Fourth District Court of Appeal
State of Florida

B/ ORAL ORDER Denying Defendant's
Motion to Suppress 6/17/83
Circuit Court, Nineteenth Judicial
Circuit of Martin County, Florida

APPENDIX

Filed with the Clerk of the United State Supreme Court

A ORDER PER CURIAM AFFIRMED 5/8/85

B AFFIDAVIT OF PROBABLE CAUSE

C SEARCH WARRANT

D DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

E TRANSCRIPT OF AMENDED MOTION TO SUPPRESS HEARING

I HEREBY CERTIFY that copies of the above have been filed with the Clerk of the United States Supreme Court this 24 day of July 1985.

Wm M. Winkel

WILLIAM M. WINKEL, ESQ.
Counsel for Petitioner

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1985

WILLIAM HOWARD PUGH. CASE NO. 83-2534

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
----------/

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

Decision filed April 3, 1985

Appeal from the Circuit Court
for Martin County;
C. Pfeiffer Trowbridge, Judge.

William M. Winkel of Winkel &
Sims, West Palm Beach for
Appellant.

Jim Smith, Attorney General,
Tallahassee, and Joan Fowler
Rossin, Assistant Attorney
General, West Palm Beach, for
Appellee.

PER CURIAM.-

Affirmed.

APPENDIX A/
1 of 2

AMSTEAD, C.J., DOWNEY and WALDEN, J.J.,
concur.

IN THE DISTRICT COUR OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

WILLIAM HOWARD PUGH,

Appellant,

v. CASE NO. 83-2534

STATE OF FLORIDA,

Appellee.

May 8, 1985

BY ORDER OF THE COURT:

ORDERED that Appellant's April 16, 1985 Motion for Rehearing is denied.

APPENDIX A/
2 of 2

I hereby certify the foregoing is a true copy of the original court order.

/s/
CLYDE L. HEATH,
CLERK

cc: William M. Winkel, Esq.
Joan Fowler Rossin, Ass't Att.General

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
MARTIN COUNTY, FLORIDA

CASE NO. 83-77

STATE OF FLOIRDA,

Plaintiff,

vs.

WILLIAM HOWARD PUGH,

Defendant.

AMENDED MOTION TO SUPPRESS HEARING

This case came before the court for hearing on June 17, 1983, before Honorable C. Pfeiffer Trowbridge, Circuit Judge, at the Martin County Courthouse, Stuart, Florida.

Appearances were as follows:

FOR THE STATE:	FOR THE DEFENDANT:
David Morgan Assistant State Attorney Stuart, Florida 33494	William M. Winkel 249 Royal Palm Way P. O. Box 2153 Palm Beach, Florida 33480

pression to the issuing magistrate that they have used confidential informants in the past on other matters, they didn't say how the informants got the information, they didn't say when the informant saw these acts, it could've been ten years ago. It's all untrustworthy and I would submit to this court that it can either suppress the evidence or grant to this defendant a--a further hearing to establish the truth or the untruth of the statements in that affidavit of probable cause.

Thank you.

THE COURT: Okay, from a legal standpoint the court's of the opinion that the affidavit is sufficient to support the issuance of the search warrant and from a factual standpoint there is no evidence that the affiant deliberately lied or acted with reckless disregard for the truth.

The warrant in my opinion covers the premises and the curtilage, including vehicles

thereon or any boats tied to docks within the curtilage and so the court's going to deny the motion to suppress.

Is that all that we have or is there any other motion that you've got that we have to dispose of?

MR. WINKEL: Your Honor has recommended that I make a written motion for the return of these items?

THE COURT: Well, I haven't recommended anything. I've told you I'm not going to hear that today and not gonna hear that until you file the motion on it. Is that all that we...